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NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

RON SIMMONS, CHAIRMAN OF THE KENTUCKY PAROLE BOARD; THE COMMONWEALTH OF KENTUCKY CORRECTIONS CABINET AND THE ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY

Petitioners

versus

GENE MORRIS DUNN

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED WHEN IT HELD THAT THE PROCEDURE ESTABLISHED BY THE KENTUCKY SUPREME COURT IN DUNN V. KENTUCKY, 703 S.W.2d 874 (KY. 1985), cert. denied, 479 U.S. 832 (1986) VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY PLACING A BURDEN OF PRODUCTION ON A DEFENDANT ATTACKING THE USE OF A PRIOR GUILTY PLEA IN A SUBSEQUENT PERSISTENT FELONY OFFENDER PROCEEDING.

II.

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN ITS REVIEW OF THE FACTUAL DETERMINATIONS OF THE KENTUCKY SUPREME COURT WHEN IT HELD THAT THE KENTUCKY SUPREME COURT WAS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO IMPOSE A CLEAR AND CONVINCING BURDEN OF PERSUASION UPON THE STATE WHEN A DEFENDANT MOVES TO SUPPRESS THE USE OF A PRIOR GUILTY PLEA IN A SUBSEQUENT PERSISTENT FELONY OFFENDER PROCEEDING.

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GENE MORRIS DUNN

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Ron Simmons, Chairman of the Kentucky Parole Board; the Commonwealth of Kentucky Corrections Cabinet and the Attorney General of the Commonwealth of Kentucky petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Appendix at 26a - 49a) is reported as Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989). The opinion of the Kentucky Supreme Court (Appendix at 1a - 6a) is reported as Dunn v. Kentucky, 703 S.W.2d 874 (Ky. 1985), cert. denied, 479 U.S. 832 (1986).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was rendered on June 13, 1989. (Appendix at 50a-51a). The petitioners' Petition For Rehearing With a Suggestion For Rehearing En Banc was denied by order of the United States Court of Appeals for the Sixth Circuit entered on July 31, 1989. (Appendix at 52a - 53a). The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides as follows:

Fourteenth Amendment
Section 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was indicted on several charges arising from an October, 1983 arrest in Jefferson County, Kentucky and was also charged with being a persistent felony offender in the first degree under Kentucky's habitual criminal

statute, KRS 532.080. (R.2, Appendix at p. 7).[1] Respondent, through counsel, moved the Jefferson Circuit Court to suppress the use of four groups of prior convictions for enhancement purposes under Kentucky's persistent felony offender statute. (R.2, Appendix at pp. 1-6). Specifically, respondent moved to prohibit the Commonwealth from using prior felony convictions from 1982, 1976, 1973 and 1970. (R. 2, Appendix at p. 9).

Following a pre-trial evidentiary hearing on respondent's motion to suppress the prior convictions, (R. 2, Appendix at pp. 15-60), the Jefferson Circuit Court concluded that a state statute - KRS 532.080(3) prohibited the use of the 1982 conviction since that

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[1]As used herein, all references to the record in this case are to the docket entry number, the name of the document, and page number as appears in the record on appeal to the United States Court of Appeals for the Sixth Circuit. The appendix referred to in this petition which appears at docket entry number 2 is not the appendix to this petition but is a document which was filed in the U. S. District Court in this case.

conviction resulted only in a fine. (R. 2, Appendix at p. 11). The transcript of the pre-trial suppression hearing conducted in the state trial court reflects that respondent did not testify concerning his plea of guilty leading to his 1976 conviction. (R. 2, Appendix at pp. 26-47). Instead, the state trial court judge utilized a transcript of the 1976 plea of guilty, (R. 2, Appendix at pp. 9-10), and declined to suppress the 1976 conviction. (R. 2, Appendix at p. 14). Respondent did, however, testify on his own behalf at the suppression hearing concerning the pleas of guilty made by him in 1970 and 1973. (R. 2, Appendix at pp. 26-47).

The state trial court denied respondent's motion to suppress the 1976, 1973 and 1970 convictions, (R. 2, Appendix at p. 14), but expressed the need for clarification of the burdens to apply when prior convictions are attacked by way of a suppression motion in a subsequent persistent felony offender proceeding, (R. 2, Appendix at p. 13):

> It would be of great assistance to this Court if a Kentucky appellate court would indicate whether the Commonwealth must do more than merely produce a certified copy of the judgment at a P.F.O. trial, and if so, what. Specifically, whether after a defendant claims a constitutional violation and introduces some evidence (usually his own extremely suspect testimony) to support a claim, the Commonwealth has the burden to establish a knowing plea.

Respondent proceeded to trial in the Jefferson Circuit Court and was ultimately convicted of possession of a controlled substance and of being a persistent felon in the first degree for which he was sentenced to twenty years imprisonment. (R. 2, Appendix at pp. 76-77).

Any question concerning the procedure the Kentucky courts are to apply when a defendant moves to suppress the use of prior convictions in a persistent felony offender proceeding was answered by the Kentucky Supreme Court in Dunn v. Kentucky, 703 S.W.2d 874, 876, cert. denied, 479 U.S. 832 (1986). (Appendix at 3a - 4a):

The second assignment of error concerns the persistent felony offender portion of the case. Pursuant to the requirement of Commonwealth v. Gadd, Ky., 665 S.W.2d 915 (1984), the appellant herein filed a motion to suppress the previous felony convictions which formed the basis of the PFO status of the appellant. We deem it necessary to discuss the procedure to be followed at such hearings, and to clarify the burden of proof necessary for the trial court to properly rule on motions filed pursuant to our opinion in Gadd. In researching those jurisdictions which have passed upon the question, we find divergent views, but feel the proper procedure is as follows:

In those cases in which the defendant is indicted as a persistent felony offender and files a proper motion to suppress any evidence of his prior offenses, the burden is on the Commonwealth to prove the judgments of conviction in each of the underlying offenses upon which it intends to rely. The presumption of regularity of judgment shall be sufficient to meet the original burden of proof. After the judgments of conviction are introduced, the burden shifts to the defendant to show any infringement of his rights or irregularity of procedure upon which he relies, such as those set out in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), or other pertinent cases. If the defendant presents evidence,

> through his testimony or other affirmative evidence, which refutes the presumption of regularity, the burden then falls to the Commonwealth to prove that the underlying judgments were entered in a manner which did, in fact, protect the rights of the defendant. A silent record simply will not suffice.

Following the decision of the Kentucky Supreme Court, respondent then unsuccessfully sought direct federal review, by this Court, of the state high court by way of a petition for writ of certiorari. Dunn v. Kentucky, 479 U.S. 832 (1986).

Respondent then filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, in the United States District Court for the Western District of Kentucky. (R. 1, Order of July 27, 1987). The United States District Court thereafter granted respondent's petition for a writ of habeas corpus as it pertained to his persistent felony offender conviction and enhanced sentence. (Appendix at 7a - 25a). The United States District Court "rejec[ted] respondent's arguments that Dunn v. Common-

wealth, supra, finds support in federal cases . . .", (Appendix at 23a), and declined to defer to the factual determinations of Kentucky's highest court concerning what respondent knew when he pled guilty in the state courts. (Appendix at 24a).

A timely appeal was then taken by the petitioners to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals, in a 2-1 decision,[2] concluded that "the methodology and standards utilized by the Kentucky Supreme Court do not comply with federal standards for determining whether a plea of guilty is intelligent and voluntary for purposes of the United States Constitution," (Appendix at 40a). The Court of Appeals reasoned that Boykin v. Alabama, 395 U.S. 238

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[2]Circuit Judge Ryan dissented from that portion of the majority's opinion which held the Kentucky procedure constitutionally flawed but did concur with the majority's holding that the factual determinations of the Kentucky Supreme Court were not entitled to the 28 U.S.C. §2254(d) presumption of correctness. (Appendix at 41a - 49a).

(1969) and Roddy v. Black, 516 F.2d 1380, 1384 (6th Cir.), cert. denied, 423 U.S. 917 (1975) forbade Kentucky from placing a burden of production on a defendant who has moved to suppress the use of a guilty plea based conviction because "Dunn permits the state to carry its burden by utilizing a bare record of a conviction upon a plea of guilty, in conjunction with the time-honored presumption that proceedings have been regularly and legally performed." (Appendix at 33a - 34a).[3]

The Court of Appeals also rejected the petitioners' argument that the United States District Court erred when it did not defer to the factual determinations of the Kentucky Supreme Court. The Court of Appeals, relying on

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[3]Circuit Judge Ryan, in dissent, wrote that the Kentucky procedure "does not permit the state to 'satisfy' its 'burden of persuasion' by invoking a presumption. It merely requires, as a procedural matter, that in order to impose upon the state a new burden to prove the validity of a heretofore presumptively valid guilty plea, the defendant must raise an issue as to its validity by offering some evidence of noncompliance with Boykin." (Appendix at 48a).

its decision in Roddy v. Black, supra, wrote that the Kentucky Supreme Court was required, as matter of federal constitutional law, to apply a clear and convincing burden of persuasion when reviewing the supplementing evidence of the earlier pleas. (Appendix at 32a; 39a). Applying what it acknowledged to be an "extraordinary" burden of persuasion, (Appendix at 31a), the Court of Appeals held that the state high court's determination of what respondent knew when he pled guilty was not entitled to the 28 U.S.C. §2254(d) presumption of correctness.

On July 31, 1989 the United States Court of Appeals for the Sixth Circuit denied the petitioners' Petition for Rehearing With a Suggestion For Rehearing En Banc. (Appendix at 52a - 53a). This petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit now follows.

REASONS FOR GRANTING THE WRIT

There are several important and special reasons why this Court should exercise its judicial discretion in favor of reviewing the judgment of the Court of Appeals. The decision of the Court of Appeals is clearly in direct conflict with the Kentucky Supreme Court's decision in Dunn v. Kentucky, supra. Further, the decision of the Court of Appeals conflicts with the law of several of Kentucky's sister states. Finally, this case involves issues of particular importance to the states' criminal justice system since it implicates the ability of a state to use a prior guilty plea to enhance the sentence of a habitual criminal.

1.) There is a direct and unequivocal conflict between the decision of the Court of Appeals and the Kentucky Supreme Court, on a federal issue, warranting review by this Court. Andersen v. Maryland, 427 U.S. 463, 470 n. 5 (1976); Lakeside v. Oregon, 435 U.S. 333, 336, n. 3 (1978). The Kentucky Supreme Court held that a defendant moving to suppress the use of a

conviction obtained in violation of his rights under Boykin v. Alabama, supra, must produce some modicum of evidence to overcome the presumption that the prior conviction is valid. (Appendix at 4a). Once a defendant refutes the presumption of regularity, the prosecution then bears the ultimate burden of persuasion on the contested issue. (Id.). The Court of Appeals, in its decision, wrote that "this methodology results in a standard different from federal standards for proving a valid waiver of constitutional rights.", (Appendix at 33a), and that "the methodology and standards utilized by the Kentucky Supreme Court do not comply with federal standards for determining whether a plea of guilty is intelligent and voluntary for purposes of the United States Constitution,". (Appendix at 40a). The conflict between the Court of Appeals and Kentucky's court of last resort could not be any more clear.

This Court should review this case to decide whether the federal constitution prohibits Kentucky from requiring a defendant to

make more than just a naked claim about his prior conviction resting upon a guilty plea.

2.) The decision of the Court of Appeals that Kentucky is forbidden by the federal constitution from imposing a burden of production upon a criminal defendant attempting to suppress a prior guilty plea in a later persistent felony offender proceeding is contrary to the principles set out by this Court in Patterson v. New York, 432 U.S. 197, 201-202 (1977):

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, Irvine v California, 347 US 128, 134, 98 L Ed 561, 74 S Ct 381 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in

> the traditions and conscience of our people as to be ranked as fundamental." Speiser v Randall, 357 US 513, 523, 2 L Ed 2d 1460, 78 S Ct 1332 (1958); Leland v Oregon, 343 US 790, 798, 96 L Ed 1302, 72 S Ct 1002 (1952); Snyder v Massachusetts, 291 US 97, 105, 78 L Ed 674, 54 S Ct 330, 90 ALR 575 (1934). [emphasis added]

The Kentucky procedure simply requires a defendant, having avoided the burden of trial and often having received a sentence less than the maximum possible, to come forward with some sort of evidentiary basis to support his motion to suppress a presumptively valid conviction based on an earlier guilty plea. No fundamental notions of justice are offended by the Kentucky procedure.

Kentucky's procedure is consistent with what was written in Loper v. Beto, 405 U.S. 473, 480 n. 6 (1972) in discussing the obligation a criminal defendant bears to substantiate an allegation that his constitutional rights were violated in a prior criminal proceeding:

> * * * "[T]he Court of Appeals * * * did not rest its decision on a finding that the petitioner had

> failed to meet his burden of proving the invalidity of the prior convictions. It reached the merits of the legal question involved, and we granted certiorari to review that decision. There is thus no basis in the record upon which we may either dismiss this case or affirm the decision below on the ground that the petitioner did not meet his burden of proving that the prior convictions were invalid. See Burgett v. Texas, 389 U.S. 109, 114-115, 19 L.Ed.2d 319, 324, 88 S.Ct. 258; Losieau v. Sigler, 406 F.2d 795, 803; Williams v. Coiner, 392 F.2d 210, 212-213"

The Kentucky procedure is consistent with this statement from Loper v. Beto, supra, and the cases cited therein. The Kentucky procedure simply requires the accused to do what is required in the federal courts when the constitutional validity of a prior conviction is contested - present evidence to overcome the presumption of regularity. United States v. Chrans, 869 F.2d 1084, 1087 (7th Cir. 1989) (defendant bears burden in habeas corpus proceeding to prove waiver of jury trial not freely and intelligently made); Robards v. Rees, 789 F.2d 379, 385 (6th Cir. 1986) (petitioner bears

burden of producing evidence that he was not represented by counsel); Luna v. Black, 772 F.2d 448 (8th Cir. 1985) (where accused introduces evidence that prior conviction constitutionally infirm, burden shifts back to government to prove otherwise).

The Court of Appeals erred when it ruled that the Kentucky procedure violated this Court's admonition in Boykin v. Alabama, supra, against presuming a waiver from a silent record. The Kentucky procedure does not permit the prosecution to satisfy its burden of persuasion by invoking a presumption. It simply requires that before the prosecution is forced to assume a new burden of persuasion, as to what has been a presumptively valid plea, a defendant must produce some evidence to support his claim of noncompliance with Boykin v. Alabama, supra. The Kentucky Supreme Court specifically cautioned that once the defendant satisfies his burden of production "[a] silent record simply will not suffice." (Appendix at 4a). The Court

of Appeals erred when it declared the Kentucky procedure constitutionally flawed.

3.) The decision of the Court of Appeals also conflicts with the law of several of Kentucky's sister states. In People v. Sumstine, 687 P.2d 904 (Calif. 1984) the California Supreme Court held that a criminal defendant would be required to produce evidence that his Boykin rights were infringed when he sought to suppress the use of a prior conviction in a subsequent sentence enhancement hearing, Sumstine, supra at 913:

> Yet the silence of the record is not entirely without relevance. When a defendant has made allegations sufficient to justify a hearing, the court must conduct an evidentiary hearing in the fashion set forth in Coffey: "[T]he prosecutor shall first have the burden of producing evidence of the prior conviction sufficient to justify a finding that defendant 'has suffered such previous conviction.' (Pen.Code, § 1025.) . . . [W]hen this prima facie showing has been made, the defendant shall thereupon have the burden of producing evidence that his constitutional [Boykin/Tahl rights were] infringed in the

> prior proceeding at issue. . . . [I]f defendant bears this burden, the prosecution shall have the right to produce evidence in rebuttal." [Fn. omitted.) (67 Cal.2d at p. 217, 60 Cal.Rptr. 457, 430 P.2d 15.) The state at first need prove only the fact of the prior conviction, but once the defendant has produced evidence tending to show his constitutional rights were infringed, it will not be sufficient rebuttal for the state to simply invoke the regularity of the silent record.

The Kentucky procedure and the one set out in Sumstine, supra, are virtually identical.

In People v. Harris, 459 N.E.2d 170, 172 (N.Y. 1983), the New York court held, "Once the fact of the prior conviction has been established, it is then incumbent upon the defendant to allege and prove the facts underlying the claim that the conviction was unconstitutionally obtained (CPL 400.21, SUBD.7, PAR. [b])." See also, Watkins v. People, 655 P.2d 834 (Colo. 1982); State v. O'Neil, 580 P.2d 495 (N.M.Ct.App. 1978); State v. Annino, 613 P.2d 84 (Or.Ct.App. 1980).

This Court should grant review of this case since the decision of the Court of Appeals

also conflicts with the virtually identical procedures established by the court of last resort in several of Kentucky's sister states.

4.) Guilty pleas play a significant role in the criminal justice systems of the various states. The great majority of criminal cases in this country are disposed of by a plea of guilty rather than proceeding to trial.[4] It has been estimated that in most jurisdictions in this country seventy to ninety percent of all felony cases are resolved by a plea of guilty. 2 W. LaFave, J. Israel, Criminal Procedure, §20.1 n. 1 (1984). The guilty plea procedure permits a defendant to limit his possible punishment and allows the state to conserve its scarce judicial and prosecutorial resources. Brady v. United States, 397 U.S. 742, 752 (1970).

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[4]Finkelstein, A Statistical Analysis of Guilty Plea Practices in the Federal Courts, 89 Harv. L. Rev. 293 (1975); Zeisel, The Disposition of Felony Arrests, 1981 A.B.F. Re.J. 407; Note, Plea Bargaining and the Transformation of the Criminal Process, 90 Harv. L. Rev. 569 (1977).

The use, by a state, of a criminal conviction based on a plea of guilty in a subsequent habitual criminal proceeding is important since guilty plea convictions are the prevalent form of conviction (as opposed to a jury trial) and given the interests of the state in the prosecution of its habitual criminals. This Court has recognized that the purpose of the states' recidivist statutes is to deter repeat offenders and to segregate for extended periods of time those who are unable, or unwilling, to conform their conduct to the basic requirements of society. Rummel v. Estelle, 445 U.S. 263, 284 (1980).

The decision of the Court of Appeals - that the Kentucky Supreme Court is forbidden by the federal constitution from requiring a defendant to raise some modicum of evidence in support of his claim that a prior guilty plea should not be suppressed unnecessarily hampers the state's use of presumptively valid guilty pleas against its most incorrigible offenders. This Court should review the judgment of the

Court of Appeals to clarify the evidentiary burdens a state may properly impose when a criminal defendant attempts to suppress the use of a prior guilty plea in a subsequent habitual criminal proceeding.

5.) The Court of Appeals also declined to defer to the factual determinations of the Kentucky Supreme Court as required by 28 U.S.C. §2254(d)[5] See, Sumner v. Mata, 449 U.S. 539 (presumption of correctness applies to factual determinations of state appellate courts). In rejecting the Kentucky Supreme Court's view of the evidence, the Court of Appeals concluded that the state high court was required, as matter of federal constitutional law, to hold the prosecution to a "clear and convincing" burden of persuasion.[6] The

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[5]The Kentucky Supreme Court, after its review of the suppression hearing evidence, determined that respondent was aware of his rights and that he was satisfied with his attorney at the time he entered his pleas. (Appendix at 5a).

[6]The Court of Appeals specifically noted that the burden of persuasion standard applied by the Kentucky Supreme Court in this case "was something less than clear and convincing." (Appendix at 39a).

federal appellate court recognized that such a standard was "extraordinary", (Appendix at 32a), but held that it was required by this Court's decision in Boykin v. Alabama, supra and its decision in Roddy v. Black, supra. Applying this extraordinary burden of persuasion to the factual determinations of the Kentucky Supreme Court, the Court of Appeals concluded that the federal courts were not required to defer to the state high court's factual determinations since the factual determinations did not have fair support in the record. (Appendix at 40a).

While the governing standard as to whether a plea of guilty is voluntary is a question of federal law, Marshall v. Lonberger, 459 U.S. 422 (1983), that does not mean that the Court of Appeals was free to impose the clear and convincing evidentiary standard on the Kentucky state courts. Smith v. Phillips, 455 U.S. 209 (1982) (federal courts possess no supervisory powers over the state courts). As noted earlier in this petition, this Court has repeatedly emphasized that questions concerning

the burden of persuasion in state criminal trials are best left to the states unless the state procedure is so fundamentally unjust or unfair as to violate the Due Process Clause. Patterson v. New York, supra; McMillen v. Pennsylvania, 477 U.S. 79, 85-86 (1986). Applying a preponderance of the evidence standard to the prosecution's ultimate burden of persuasion does not violate the Due Process Clause since this court has "never held that the 'clear and convincing evidence' standard is the appropriate one" when the prosecution is required to prove a waiver of federal constitutional rights. Colorado v. Connelly, 479 U.S. 157, 167-168 (1986).

Of course, the state is required to prove every element of an offense beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970).[7] However, this Court has repeatedly

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[7]The Court of Appeals, in its opinion, recognized that the issue presented to it in this case did not involve a question involving the elements of respondent's persistent felony offender conviction. (Appendix at 29a).

held that a state need only prove the waiver of constitutional rights by a preponderance of the evidence in those instances where the state bears the burden of proof. Lego v. Twomey, 404 U.S. 477 (1972) (state required to prove voluntariness of confession at suppression hearing by no more than preponderance of the evidence); Nix v. Williams, 467 U.S. 444, n. 5 (1984). The Court of Appeals erred when it held, as a matter of federal constitutional law, that Kentucky must impose a clear and convincing burden of persuasion standard on the prosecution when the defendant moves to suppress a prior guilty plea. This Court has stated that "the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence." United States v. Matlock, 415 U.S. 164, 178, n. 14 (1974). The decision of the Court of Appeals is "a wholly unjustifiable encroachment . . . upon the constitutional power of States to promulgate their own rules of evidence to try

their own state-created crimes in their own state courts,". Spencer v. Texas, 385 U.S. 554, 568-569 (1967).

The refusal of the Court of Appeals to defer to the factual determinations of the Kentucky Supreme Court concerning what respondent knew when he pled guilty is flawed since it applied the extraordinary standard of "clear and convincing" evidence to the facts adduced at the suppression hearing. Applying a preponderance of the evidence standard to the facts in this case, the factual determinations of the Kentucky Supreme Court do have fair support in the record.[8] 28 U.S.C. §2254(d); Wainwright v. Goode, 464 U.S. 78 (1983).

Concerning his 1973 plea, respondent answered "No" when his attorney asked him if the trial judge had informed him of his rights to

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[8]The Kentucky Supreme Court held that respondent failed to satisfy his burden of production as to his 1976 conviction since he failed to testify or present any other affirmative evidence on that conviction. (Appendix at 5a).

trial by jury, the right to confront witnesses and the right to remain silent. (R. 2, Appendix at p. 27). However, upon cross-examination respondent admitted knowing of his right to a jury trial and his right to confront witnesses. (R. 2, Appendix at pp. 27-29). The record also reflects that respondent was represented by counsel at his 1973 plea, (R. 2, Appendix at p. 9), and admitted that he was seeking a "package deal" at the time since he was, by his own admission, "in the wrong". (R. 2, Appendix at p. 32).

Concerning his 1970 guilty plea, respondent again simply replied "No" when asked if he had been informed of his rights to a jury trial, to confront witnesses and to remain silent. (R. 2, Appendix at pp. 41-42). Respondent admitted that he was represented by counsel who "probably" explained that he could have a trial if he wanted one, (R. 2, Appendix at p. 43), and "guessed" that his attorney negotiated a plea bargain arrangement because

that's what he [respondent] wanted. (R. 2, Appendix at p. 43).

Based on these facts, the Kentucky Supreme Court correctly concluded that the prosecution had carried its ultimate burden of persuasion. There is fair support in the record to support the conclusion that the prosecution had shown, by a preponderance of the evidence, that respondent's pleas were voluntary and intelligent. See, North Carolina v. Alford, 400 U.S. 25, 31 (1970) ("standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant"); Brady v. United States, 397 U.S. 742 (1970).

This Court should review this case to determine if the Court of Appeals erred when it held that the state high court was required, by the United States Constitution, to hold the prosecution to a "clear and convincing" burden of persuasion.

Because the Court of Appeals believed federal law required it to decide the case the way it did, this Court has jurisdiction and should grant the petition, and review the questions presented.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

RENDERED: December 19, 1985
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

No. 85-SC-52-MR

GENE MORRIS DUNN, JR. APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JOHN W. POTTER, JUDGE
No. 83-CR-1535

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION OF THE COURT BY JUSTICE GANT

AFFIRMING

Appellant was convicted of possession of a Schedule II narcotic and sentenced after trial as a first degree persistent felony offender to a term of 20 years. Two issues are presented on this matter of right appeal.

The first error asserted by appellant concerns the exclusion of certain evidence during the trial in chief. This evidence was taken by avowal and related to the rehabilitation in Jefferson County, and described the programs and facilities available. The stipulated purpose of this evidence was to permit counsel for appellant

to argue to the jury that they should fine the appellant rather than incarcerate him so he might continue in the programs. The statute under which appellant was convicted is KRS 218A.990(7), which provides a penalty range of from one to five years, or a fine of from $3,000 to $5,000, or both, which offense is a Class D felony under KRS 532.020(1)(a).

In considering the alleged error of excluding this evidence, we note that no argument is made, nor can it be, that said prohibition in any way affected the determination of guilt or innocence, but merely that it could have affected the sentence on the original charge. However, appellant herein was sentenced as a persistent felony offender in the first degree with that sentence to be served in lieu of the sentence assigned by the jury on the principal charge. The evidence which was excluded was not offered in mitigation of the persistent felony offender procedure pursuant to KRS 532.080. As we have stated, the felony of which the appellant was

convicted was a Class D felony and his resulting sentence as a persistent felony offender was not affected by the exclusion of this evidence.

The second assignment of error concerns the persistent felony offender portion of the case. Pursuant to the requirement of Commonwealth v. Gadd, Ky., 665 S.W.2d 915 (1984), the appellant herein filed a motion to suppress the previous felony convictions which formed the basis of the PFO status of the appellant. We deem it necessary to discuss the procedure to be followed at such hearings, and to clarify the burden of proof necessary for the trial court to properly rule on motions filed pursuant to our opinion in Gadd. In researching those jurisdictions which have passed upon the question, we find divergent views, but feel the proper procedure is as follows:

In those cases in which the defendant is indicted as a persistent felony offender and files a proper motion to suppress any evidence of his prior offenses, the burden is on the Commonwealth to prove the judgments of conviction in each of

the underlying offenses upon which it intends to rely. The presumption of regularity of judgment shall be sufficient to meet the original burden of proof. After the judgments of conviction are introduced, the burden shifts to the defendant to show any infringement of his rights or irregularity of procedure upon which he relies, such as those set out in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), or other pertinent cases. If the defendant presents evidence, through his testimony or other affirmative evidence, which refutes the presumption of regularity, the burden then falls to the Commonwealth to prove that the underlying judgments were entered in a manner which did, in fact, protect the rights of the defendant. A silent record simply will not suffice.

Applying this procedure to the case before us, we find that the Commonwealth met its original burden as hereinabove prescribed by introducing the proof of three pleas of guilty to felony charges in 1976, 1973, and 1970, which

judgments did show the convictions and further showed that the appellant was represented by counsel on each occasion. Thereafter, the appellant took the stand and testified, under oath of course, that the trial judge had failed to advise him of certain rights prior to the entry of the plea of guilty in the 1976 and 1973 proceedings. No evidence was given to rebut the presumption of regularity in relation to the 1970 conviction. At this juncture, the burden shifted back to the Commonwealth on the two judgments referred to, and the record is totally silent on the issue of whether the trial judge advised him of his rights. However, the Commonwealth cross-examined the appellant concerning the issue, and he readily admitted that he knew of the rights about which he contends he was not informed by the court. The evidence further indicated he was satisfied with the manner in which he was represented by counsel. We fail to see any reversible error in the failure of the trial

court, if there was such failure, to advise the appellant of rights he admits he already knew existed.

The judgment is affirmed.

All concur.

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

GENE MORRIS DUNN
Petitioner

v. NO. C 87-0462-L(B)

RON SIMMONS, CHAIRMAN,
PAROLE BOARD, CORRECTIONS
CABINET
Respondent

MEMORANDUM

This matter is before the Court on motion of the petitioner, Gene Morris Dunn, for entry of summary judgment granting his petition for a writ of habeas corpus filed July 27, 1987, pursuant to Title 28 U.S.C. § 2254, and on motion of the respondent, Ron Simmons, to dismiss the petition or, in the alternative, to enter summary judgment.

On December 7, 1984, the petitioner was convicted of possession of a controlled substance and was sentenced as a first degree persistent felony offender in Jefferson Circuit Court. His five year sentence was enhanced to 20 years under KRS 532.080. His subsequent appeal to the Kentucky Supreme Court was affirmed

in Dunn v. Commonwealth, 703 S.W.2d 874 (1985), and his petition for writ of certiorari to the United States Supreme Court was denied.

The issue raised in this petition for writ of habeas corpus is whether petitioner was denied federal due process of law by the allocation of the burdens of proof and production used in the persistent felony portion of the proceedings. Specifically, petitioner argues that the procedures used in the Kentucky courts in ruling on the validity of his prior convictions forming the basis for the persistent felon charge violated Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969), and Roddy v. Black, 516 F.2d 1380 (6th Cir. 1975). Petitioner maintains that although Kentucky's highest court has ruled that a defendant must be given an opportunity to exclude improper evidence from consideration at a trial, it has done so in a manner inconsistent with federal constitutional law, denying him the due process to which he is entitled under Bruton v. United

States, 391 U.S. 123, 88 S.Ct. 1620 (1968), and Burgett v. Texas, 389 U.S. 109, 115, 88 S.Ct. 258 (1967).[1]

Boykin, 395 U.S. at 243, 89 S.Ct. at 1712, held that an effective waiver of a federal constitutional right is governed by federal standards.

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653. Second, is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491. Third, is the right to confront one's accusers. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923. We cannot presume a waiver of these three important federal rights from a silent record.

---

[1] In Burgett it was held that the use of a prior conviction which was constitutionally invalid because made while a defendant was denied his right to counsel was inherently prejudicial when used in a sentence enhancement proceeding.

Therein the Court, in discussing the constitutionality of the process by which the trial judge had accepted the petitioner's guilty plea for robbery, held that, "[i]t was error, plain on the face of the record, for the judge to accept the plea without an affirmative showing that it was intelligent and voluntary." Id., 395 U.S. at 242, 89 S.Ct. at 1711. The Court elaborated, 395 U.S. at 243, 89 S.Ct. at 1712, that:

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought [citations omitted] and forestalls the spin-off of collateral proceedings that seek to probe murky memories.

In the instant case, the constitutionality of the prior guilty pleas was attacked during a pretrial hearing preceding the persistent felon stage of the trial as required by Alvey v. Commonwealth, Ky., 648 S.W.2d 858

(1983). In its opinion and order the trial court admitted that Kentucky differs from the Sixth Circuit on how the constitutional issues should be resolved, citing Roddy v. Black, 616 F.2d 1380 (6th Cir. 1975).

> The Court will reach the outcome it feels 99 out of 100 trial judges would reach and the outcome that it feels would be upheld on appeal 99 out of 100 times. However, this Court believes that a majority of those judges who would reach the result reached here would do so by making findings that were less than sincere. These courts would engage in presumptions or find facts that common sense would militate against. This Court will find the facts as it thinks they would be found by a factfinder unhampered by the outcome that they might produce. Hopefully, the higher courts will answer some questions so that lower courts can deal with what must be an important every day matter in a straight forward manner.

In addressing the validity of the two 1976 convictions, three 1970 convictions, and one 1973 conviction, the Court found that as to the 1973 and 1970 convictions, there was no evidence except the judgments themselves, which only recite that petitioner was represented by

counsel during those pleas. The 1976 plea to two indictments was accompanied by a transcript which indicated that petitioner was asked:

> "Do you understand you have a right to a trial on that if you wish?"
>
> "Yes, sir."
>
> "You wish to waive that right and plead guilty because you are guilty, is that correct?
>
> Yes."

Essentially, the same two questions were asked in regard to the second indictment. The petitioner testified that there had been no colloquy by the courts to determine whether he was entering his 1970 and 1973 pleas voluntarily and knowingly.

The trial court then made specific findings:

> "(1) There has been a failure to show that Mr. Dunn knowingly and voluntarily waived his constitutional rights in his 1970 and 1973 pleas.
>
> (2) There has been a failure to show that he did not knowingly and voluntarily waive his constitutional rights in the 1970 and 1973 pleas.

(3) Mr. Dunn was not advised of his constitutional rights through a colloquy with the court in his 1970 and 1973 pleas. (This finding is based in part upon this Court's review of transcripts, where they exist, in other pleas taken by the court in 1970 and 1973).

(4) The record is silent as to whether Mr. Dunn's 1970 and 1973 pleas were knowing and voluntary.

(5) As to the 1976 plea, the record is not totally silent as to whether his plea wa voluntary and knowing, there being some indication of understanding.

(6) As to the 1976 plea the record is inadequate to establish that the plea was knowing.

(7) As to the 1976 plea the trial court did not comply with Boykin or RCr. 8.08 (i.e. that the court did not advise Mr. Dunn of all of his constitutional rights, make a record thereof or make a finding that the plea was knowing).

(8) Based upon Mr. Dunn's experience in prison and the partial record, his plea in 1976 was, in fact, voluntary and knowing.

(9) The Commonwealth has not established by clear and convincing evidence that the 1976 plea was voluntary and knowing.

(10) Mr. Dunn has "claimed' that his 1970, 1973 and 1976 convictions were not entered knowingly and has introduced some evidence to support that claim.

The Court next held that the 1976 plea should not be suppressed. In ruling on the 1973 and 1970 pleas, the court recognized that cases conflict on the effect of a plea, defective under Boykin, on the use of such plea in persistent felony proceedings.

> This Court will rule, because it believes the vast majority of the other Kentucky courts would reach the same result by hook or crook, that the 1970 and 1973 convictions should not be suppressed. It is doing so on the grounds that Mr. Dunn has failed to prove the underlying pleas were entered unknowingly and that even in the face of a silent record the presumption in favor of a judgment places the burden on Mr. Dunn to prove the unconstitutionality of the prior conviction. Ingram v. Commonwealth, 427 S.W.2d 815, 819 (1968). Since virtually every defendant's testimony on this point will be suspect, the presumption is virtually unrebuttable.
>
> So that there will be no mistake should there be an appeal (sic). If the Commonwealth has the burden of establishing the constitutional

> soundness of prior convictions after the Defendant has put them in issue then any conviction based upon the 1970 or 1973 convictions should be reversed. If the Commonweath's burden is to establish by clear and convincing evidence, then any conviction based upon the 1976 convictions should be reversed.

The Court then requested assistance from reviewing courts that would clarify who has the burden of proof on the voluntariness issue. It is obvious that the Court, relying on Ingram, placed the burden on the petitioner, although it recognized that the Sixth Circuit requires that where the transcript is inadequate the Commonwealth has the burden to show a knowing waiver with clear and convincing evidence. Lonberger v. Jago, 635 F.2d 1189 (6th Cir. 1980), rev'd on other grounds, Marshall v. Lonberger, 459 U.S. 432, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

On appeal to the Kentucky Supreme Court, petitioner was again denied relief. The Court, in a published opinion, outlined the "proper" procedure to be followed:

In those cases in which the defendant is indicted as a persistent felony offender and files a proper motion to suppress any evidence of his prior offenses, the burden is on the Commonwealth to prove the judgments of conviction in each of the underlying offenses upon which it intends to rely. The presumption of regularity of judgment shall be sufficient to meet the original burden of proof. After the judgments of conviction are introduced, the burden shifts to the defendant to show any infringement of his rights or irregularity of procedure upon which he relies, such as those set out in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), or other pertinent cases. If the defendant presents evidence, through his testimony or other affirmative evidence, which refutes the presumption of regularity, the burden then falls to the Commonwealth to prove that the underlying judgments were entered in a manner which did, in fact, protect the rights of the defendant. A silent record simply will not suffice.

Applying this procedure to the case before us, we find that the Commonwealth met its original burden as hereinabove prescribed by introducing the proof of three pleas of guilty to felony charges in 1976, 1973, and 1970, which judgments did show the convictions and further showed that the

> appellant was represented by counsel on each occasion. Thereafter, the appellant took the stand and testified, under oath of course, that the trial judge had failed to advise him of certain rights prior to the entry of the plea of guilty in the 1976 and 1973 proceedings. No evidence was given to rebut the presumption of regularity in relation to the 1970 conviction. At this juncture, the burden shifted back to the Commonwealth on the two judgments referred to, and the record is totally silent on the issue of whether the trial judge advised him of his rights. However, the Commonwealth cross-examined the appellant concerning the issue, and he readily admitted that he knew of the rights about which he contends he was not informed by the court. The evidence further indicated he was satisfied with the manner in which he was represented by counsel. We fail to see any reversible error in the failure of the trial court, if there was such failure, to advise the appellant of rights he admits he already knew existed.

Habeas petitions may be adjudicated on the record of testimony at the state hearing alone if the record reveals that the defendant enjoyed a full and fair hearing under the standards in Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); Clayton v.

Blackburn, 478 F.2d 117 (5th Cir. 1978). The state hearing in the instant case met the required standard.

> It is troubling, of course, that the state in this case misplaced or lost the petitioner's guilty plea transcript notes. The purpose of Boykin hearings, besides protecting defendants, is to help assure the finality of state court convictions in order to avoid collateral hearings in which memories become hazy and the evidence uncertain. Where no transcript is made or available of a guilty plea hearing, that purpose is obviously frustrated. See Blackledge v. Allison, 1977, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136.
>
> However, it is still the petitioner's burden in a habeas proceeding to demonstrate, at least prima facie, those facts that establish a constitutional violation. In deciding whether the petitioner's testimony alone meets that burden, and whether the state violated its duty in not making a transcript available, all of the facts must be considered, including any delay by the petitioner in seeking relief and his opportunities for earlier applications.

Clayton v. Blackburn at 120.

Petitioner insists that the trial court and the Kentucky Supreme Court applied a procedure governing the burden of proof in the suppression hearing which conflicts with the federal standards announced in Roddy v. Black, 516 F.2d 1380 (6th Cir. 1975). Roddy v. Black did not involve a challenge to prior convictions to be used in a persistent felony offender hearing. The defendant in that case was faced with revocation of his probation and waited until that time to challenge the previously entered guilty pleas. The Court did, however, discuss Boykin in recognizing that a careful on-the-record inquiry by the trial judge would aid in the prevention of spin-off collateral attacks.

> If the discussion between defendant and trial judge at the time of a plea's acceptance leaves doubt as to whether a plea was in fact voluntary and intelligent, however, a defendant is not automatically entitled to a reversal of his conviction. Rather, in that circumstance if a defendant argues in a post-conviction proceeding that

> his plea was entered without his consent or without an understanding of the plea's nature and consequences, Boykin places a burden on the State to prove the contrary. A habeas court may not 'presume a waiver of [a defendant's] federal rights from a silent record.' 395 U.S. at 243, 89 S.Ct. at 1712. The State must prove that the defendant's guilty plea was voluntary and intelligent, and to do so it may introduce evidence extrinsic to the transcript of the plea's acceptance. (Citations omitted.)
>
> * * * *
>
> In the face of an inadequate transcript at the time of a guilty plea's acceptance, the state must make a clear and convincing showing that the plea was in fact knowingly and understandingly entered.

Roddy v. Black at 1384.

In Lonberger v. Jago, supra, the habeas corpus petitioner was convicted of aggravated murder with a "specification," resulting in capital punishment under Ohio's penalty enhancement statute. A prior conviction of attempted murder was one of the "specifications" statutorily prescribed. The petitioner made a pretrial motion to dismiss the specification on

the ground that his 1972 guilty plea to attempted murder had not been knowingly or voluntarily made. A hearing was held, wherein the state offered as proof of voluntariness the conviction statement and the transcript of the plea's acceptance. The trial court, however, rejected the defendant's arguments. On appeal of the denial of defendant's petition for writ of habeas corpus, the Sixth Circuit held that because nowhere did it affirmatively appear in the transcript of his plea that he was aware of the nature of the charge, the transcript was inadequate to show that he understood that he was pleading guilty to attempted murder. "We hold, therefore, that the state failed to meet its burden to show by clear and convincing evidence that the defendant understood the nature of the charge against him." Id. at 1195. A writ of habeas corpus was ordered.

In addition to Ingram, supra, other Kentucky cases clearly place the burden of proof on the defendant in a persistent felon

proceeding to show the unconstitutionality of his prior pleas. See Gadd v. Commonwealth, Ky., 665 S.W.2d 915 (1984), and Phillips v. Commonwealth, Ky., 559 S.W.2d 724 (1977).

It is also clear under the federal cases discussed that if there is an inadequate record of a guilty plea, there may be no assumption that the plea was validly made. "We cannot presume a waiver of these important federal rights from a silent record." Boykin at 1712. In the face of an inadequate transcript, the government must prove the validity of the prior convictions with clear and convincing evidence. Roddy v. Black, supra. Lonberger v. Jago, supra. The unpublished cases of Frazier v. Scroggy, No. 86-5985 (6th Cir. Nov. 1, 1987), and Sullivan v. Rees, No. 85-5753/5844 (6th Cir. Sept. 26, 1986), are fully in accord with these principles.

In the instant case there was no transcript available as evidence of the 1970 and 1973 pleas, and only two questions were asked during the 1976 plea. This Court is in

agreement with the trial court that the requirements of Boykin were not met. However, this Court disagrees that the burden was on the petitioner to prove the invalidity of the pleas. The Court rejects respondent's arguments that Dunn v. Commonwealth, supra, finds support in federal cases, as the authorities respondent cites involve suppression in a search and seizure context. The Court also rejects respondent's contention that no federal question is involved, and that Kentucky courts make a practice of keeping the transcripts only a certain period of time, thus putting the state at an evidentiary disadvantage in collateral proceedings.

Under the facts of this case a writ of habeas corpus is appropriate. The trial court acknowledged that if the Commonwealth had the burden of proof then all of the pleas should be suppressed. Petitioner was the only person to testify at the suppression hearing, after which the Court made express findings that (1) the

petitioner was not advised of his rights in the 1970 and 1973 pleas through a colloquy with the judge; (2) the record is silent as to whether those pleas were knowing and voluntary; (3) there has been a failure to show that petitioner knowingly and voluntarily waived his rights in 1970 and 1973, and (4) the Commonwealth has not established by clear and convincing evidence that the 1976 plea, defective under Boykin and Ky.R.Cr.P. 8.08, was knowing and voluntary.

A state court's findings are presumed correct if they are basic, primary, or historical facts; mixed determinations of law and fact are open to full review by this Court. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). The governing standards as to whether a plea is voluntary is governed by federal law. Marshall v. Lonberger, supra. The basic facts, found by the trial court after a full evidentiary hearing, were incorrectly applied by placing the burden on the petitioner and his petition for writ of habeas corpus will be granted.

An appropriate order has been entered this 30th day of November, 1987.

/s/Thomas A. Ballantine, Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to: Petitioner
Counsel of record

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 88-5015
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GENE M. DUNN, JR., Petitioner-Appellee,	)
v.	) ON APPEAL from the United States District Court for the Western District of Kentucky
RON SIMMONS, CHAIRMAN, PAROLE BOARD, CORRECTIONS CABINET, and DAVID L. ARMSTRONG, Respondents-Appellants.	)

Decided and Filed June 13, 1989

Before: RYAN and NORRIS, Circuit Judges; and LIVELY, Senior Circuit Judge.*

NORRIS, Circuit Judge, delivered the opinion of the court, in which LIVELY, Senior Circuit Judge, joined. RYAN, Circuit Judge (pp. 10-14) delivered a separate opinion concurring in part and dissenting in part.

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*The Honorable Pierce Lively became Senior Circuit Judge on January 1, 1989.

ALAN E. NORRIS, Circuit Judge. This is an appeal by the state from an order of the district court granting a writ of habeas corpus to petitioner, Gene M. Dunn, Jr. Dunn was found guilty by a Kentucky jury of the substantive offense of possession of a controlled substance, and of being a persistent felony offender (PFO), and these convictions were upheld by the Kentucky Supreme Court. The effect of the district court's order is to relieve Dunn of his conviction as a PFO and its enhanced sentence, but to leave undisturbed his conviction for possession of a controlled substance.

Prior to trial, Dunn sought to have the PFO indictment dismissed, contending that the 1970, 1973, and 1976 convictions upon which that charge was based, should be suppressed. He argued that the prior convictions were based upon invalid guilty pleas, since those pleas were accepted without Dunn having intelligently and voluntarily waived federal constitutional rights to which he was entitled. While expressing concern that he was required to

follow case law from Kentucky appellate courts that conflicted with federal standards for determining whether federal rights are validly waived, the state trial judge overruled the motion. The jury then found Dunn guilty of the PFO charge, as well as of the substantive offense.

In his petition for a writ of habeas corpus, Dunn maintained that the Kentucky courts improperly adjudicated the validity of his prior convictions. The district court agreed.

I.

The state first contends that the district court erred when it determined that the prior convictions, upon which Dunn's PFO conviction was based, were invalid since the state failed to demonstrate that Dunn intelligently and voluntarily waived his federal constitutional rights when he entered the guilty pleas resulting in those convictions. Specifically, the state argues that the Kentucky Supreme Court has correctly assigned the burdens of evidence production and persuasion in

proceedings to determine if federal constitutional rights have been waived in guilty plea proceedings.

Under Kentucky's PFO statute, Ky. Rev. Stat. Ann. § 532.080 (Baldwin 1984), the state's burden in proving the fact of a prior felony conviction is to persuade the jury beyond a reasonable doubt. Hon v. Kentucky, 670 S.W.2d 851, 853 (Ky. 1984). Resolution of that question of fact is not involved in this appeal; instead, we are reviewing the determination of a question of law initially made by the state trial court after a suppression hearing, affirmed by the Kentucky Supreme Court, and ultimately addressed by the district court upon Dunn's petition for a writ of habeas corpus. That question of law concerns the legal validity of Dunn's prior convictions.

Generally, when courts are called upon to decide this question of law, a prior conviction is being examined in the context of a pretrial motion filed in a PFO prosecution, or in a post-conviction inquiry into whether the

conviction is invalid. The question is whether the conviction is based upon a guilty plea accepted in the absence of a valid waiver by the accused of the federal constitutional rights he surrendered by pleading guilty.

In Boykin v. Alabama, 395 U.S. 238 (1969), the United States Supreme Court noted that, for purposes of establishing that when a state court defendant entered a guilty plea he also waived federal constitutional rights to trial by jury and to confront one's accusers and the privilege against compulsory self-incrimination, the state is required to prove that the plea was intelligent and voluntary. "We cannot presume a waiver of these three important federal rights from a silent record." Id. at 243. Where the waiver is subsequently challenged, the state normally will attempt to demonstrate its effectiveness by introducing a transcript of the proceedings surrounding the trial court's acceptance of the guilty plea, and other trial court records. Where the records leave doubt as to whether the plea was in fact

intelligent and voluntary, the state may look to evidence extrinsic to the court records, such as the recollection of those attending the plea proceedings. However, in the face of a record which is inadequate to demonstrate the regularity of proceedings at the time of a guilty plea's acceptance, the state must make a clear and convincing showing with this extrinsic evidence that the plea was in fact intelligently and voluntarily entered. Roddy v. Black, 516 F.2d 1380, 1384 (6th Cir.), cert. denied, 423 U.S. 917 (1975). We have imposed this extraordinary standard of persuasion in view of misgivings inherent in "collateral proceedings that seek to probe murky memories," a problem not present where the contemporary record demonstrates a valid waiver. Boykin, 395 U.S. at 244.

Federal law governs the appropriate standards for determining whether a plea of guilty is intelligent and voluntary for purposes of the United States Constitution. Marshall v. Lonberger, 459 U.S. 422, 431 (1983); Boykin, 395

U.S. at 243. Because the circumstances surrounding the acceptance of a guilty plea necessarily must be examined, federal standards control the limited fact-finding role required of the court in arriving at a determination of this question of law. In view of Boykin and Roddy, we conclude that among those standards must be counted these: Where the record from the trial court is inadequate to affirmatively demonstrate that the plea was intelligent and voluntary, the state may not utilize a presumption to satisfy its burden of persuasion. And, where it seeks to satisfy that burden by supplementing an incomplete contemporaneous record with extrinsic evidence that evidence must be clear and convincing.

In the course of its opinion affirming Dunn's convictions, the Kentucky Supreme Court set out its view of the methodology a state trial court should employ in determining whether a prior conviction predicated upon a guilty plea is valid under the United States Constitution:

> In those cases in which the defendant is indicted as a persistent felony offender and files a proper motion

> to suppress any evidence of his prior offenses, the burden is on the Commonwealth to prove the judgments of conviction in each of the underlying offenses upon which it intends to rely. The presumption of regularity of judgment shall be sufficient to meet the original burden of proof. After the judgments of conviction are introduced, the burden shifts to the defendant to show any infringement of his rights or irregularity of procedure upon which he relies, such as those set out in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), or other pertinent cases. If the defendant presents evidence through his testimony or other affirmative evidence which refutes the presumption of regularity, the burden then falls to the Commonwealth to prove that the underlying judgments were entered in a manner which did, in fact, protect the rights of the defendant. A silent record simply will not suffice.

Dunn v. Kentucky, 703 S.W.2d 874, 876 (Ky. 1985), cert. denied, 479 U.S. 832 (1986).

Manifestly, this methodology results in a standard different from federal standards for proving a valid waiver of federal constitutional rights. Dunn permits the state to carry its burden by utilizing a bare record of a conviction upon a plea of guilty, in conjunction

with the time-honored presumption that judicial proceedings have been regularly and legally performed.[1]

Under the Dunn procedure, the state retains the burden of persuasion on the ultimate question of intelligent and voluntary waiver. But, once the state establishes the plain record of conviction, the burden of producing evidence shifts to the defendant to show an irregularity in the plea procedure since that unadorned record, bolstered by the presumption, is held by Dunn to be sufficient to establish a prima facie case that the guilty plea was validly accepted. The defendant is permitted to "refute" this presumption, presumably by evidence that would be sufficient to support a finding that the plea proceedings were inadequate.

Although the Dunn procedure ostensibly permits the use of the presumption only to

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[1]This court, in a comment which arguably was not necessary to the resolution of the appeal then before it, recently noted inconsistencies between opinions of the Kentucky Supreme Court and Boykin. Rudolph v. Parke, 856 F.2d 738, 740 (6th Cir. 1988).

satisfy a burden of production, in reality it may be utilized by the state to carry its ultimate burden of persuasion. That is because, if the defendant offers no rebuttal, the state will prevail; the presumption becomes a substitute for evidence supplementing the conviction record. The practical effect of the Dunn procedure, then, is to allow the state to prevail by carrying its burden of persuasion upon the bare record of the fact that a conviction was entered against the defendant. This result ignores the Supreme Court's admonition in Boykin against presuming a waiver from a silent record. And, it offends this court's requirement in Roddy, since, when the state is said to have made out a bare prima facie case, and it has done so only by relying upon a presumption, the state cannot be said to have met its burden of persuasion by supplementing an inadequate record with clear and convincing evidence. In addition, the Dunn procedure does not impose the clear and convincing burden of persuasion in the event

the state does utilize extrinsic evidence to supplement the record.

II.

The state also maintains that the district court was bound by findings of fact made by the Kentucky Supreme Court, and erred in not deferring to that factual determination.

No transcript of the plea proceedings leading to the 1970 and 1973 convictions was available at the June 20, 1984 state trial court suppression hearing, but there was a transcript from the 1976 plea hearing. In the 1976 proceeding, the judge elicited positive answers when he asked Dunn only if he understood that by pleading guilty he was waiving his right to trial by jury, and whether he was satisfied with the services of his attorney who represented him on the 1976 charges. At the suppression hearing, Dunn testified that neither in the 1970 nor the 1973 proceedings had he been advised by the trial judge of his rights to trial by jury, to cross-examine witnesses, and to remain silent. Upon cross-examination by the state,

Dunn conceded that he had some knowledge "now from the trials I have had" that he was entitled to a jury trial and could cross-examine witnesses, but said he "didn't understand anything" back in 1970 and 1973.

Although the trial judge allowed the convictions to stand, based upon his understanding that Kentucky case law placed upon Dunn the burden of proving that the convictions were invalid, he nevertheless clearly stated his view of the evidence:

> So that there will be no mistake should there be an appeal[,] [i]f the Commonwealth has the burden of establishing the constitutional soundness of prior convictions after the Defendant has put them in issue then any conviction based upon the 1970 or 1973 convictions should be reversed. If the Commonwealth's burden is to establish by clear and convincing evidence, then any conviction based upon the 1976 convictions should be reversed.

The Kentucky Supreme Court addressed this same evidence in the context of the procedure it had set out earlier in its opinion:

> [T]he appellant took the stand and testified . . . that the trial judge had failed to advise him of certain rights prior to the entry of the plea of guilty in the 1976 and 1973 proceedings. No evidence was given to rebut the presumption of regularity in relation to the 1970 conviction. At this juncture, the burden shifted back to the Commonwealth on the two judgments referred to, and the record is totally silent on the issue of whether the trial judge advised him of his rights. However, the Commonwealth cross-examined the appellant concerning the issue, and he readily admitted that he knew of the rights about which he contends he was not informed by the court. The evidence further indicated he was satisfied with the manner in which he was represented by counsel. We fail to see any reversible error in the failure of the trial court, if there was such failure, to advise the appellant of rights he admits he already knew existed.

Dunn, 703 S.W.2d at 876.

If the Kentucky Supreme Court's view of the evidence is correct, then it can be argued that the Dunn procedure is irrelevant to the resolution of this appeal, since the supreme court concluded that the state carried its ultimate burden of persuasion through evidence supplementing the bare records of conviction.

However, as we have previously noted, where the record of the plea proceedings is incomplete, the federal standard for determining whether a plea of guilty is intelligent and voluntary for purposes of the United States Constitution demands that supplementing evidence be clear and convincing. Although the Kentucky Supreme Court did not specifically address the measure of persuasion it was applying to Dunn's answers on cross-examination, manifestly, it was something less than clear and convincing. By contrast, the state trial judge pointed to the inescapable legal conclusion that must be drawn in view of all the evidence presented to him at the suppression hearing, were he to apply the correct burdens of production and persuasion. Moreover, a federal court is not required to accord to a state court's determination of a factual issue the presumption of correctness required by 28 U.S.C. §2254(d), where that determination is not fairly supported by the record. 28 U.S.C. §2254(d)(8). In view of the inconsistencies between the supreme court's

recitation of the June 20, 1984 proceedings and what actually occurred at that hearing, the court's characterization of Dunn's testimony upon cross-examination, that "he readily admitted that he knew of the rights about which he contends he was not informed by the court," is not fairly supported by the record.

III.

Because the methodology and standards utilized by the Kentucky Supreme Court do not comply with federal standards for determining whether a plea of guilty is intelligent and voluntary for purposes of the United States Constitution, and the determination of a factual issue by the Kentucky Supreme Court in Dunn's appeal is not entitled to the presumption of correctness and is incorrect as demonstrated by the record in this cause, the order of the district court is affirmed.

RYAN, Circuit Judge (concurring in part; dissenting in part). Because my colleagues have correctly determined that the State of Kentucky failed to carry its burden of proving that Dunn waived his entitlement to a trial by jury and to confront his accusers, and his privilege against self-incrimination in connection with his 1970, 1973 and 1976 guilty pleas, I concur in the court's decision affirming the judgment of the district court. My reasons are limited to those addressed in part II of my brother's opinion. I respectfully disagree, however, with what is written in part I and dissent therefrom.

In the first place, what is written in part I of the court's opinion is dicta and is, therefore, unnecessary to the court's decision. The defendant's conviction was properly vacated by the district court because the transcript of the 1970 guilty plea demonstrates conclusively that the defendant did not knowingly waive his constitutional rights, and the extrinsic evidence that he did so with respect to the 1973

and 1976 convictions is not clear and convincing as required by Roddy v. Black, 516 F.2d 1380 (6th Cir.), cert. denied, 423 U.S. 917 (1975). And these conclusions are inescapable without regard to the Kentucky Supreme Court's requirement that the defendant must introduce some evidence challenging the validity of his prior guilty pleas before the state may be required to assume and carry the burden of proving "that the underlying judgments were entered in a manner which did, in fact, protect the rights of the defendant." Dunn v. Commonwealth, 703 S.W.2d 874, 876 (Ky. 1985), cert. denied, 479 U.S. 832 (1986). Therefore, there is no proper occasion, in my view, to address the constitutional issue raised by Dunn's argument that the Kentucky procedure for challenging the validity of guilty pleas violates the Constitution.

But having chosen to address the point, my colleagues have, in my judgment, decided the matter incorrectly.

The Kentucky Supreme Court's procedure announced in Dunn is not invalid under the Federal Constitution or any decisions of this court or of the United States Supreme Court, and certainly it does not contravene the rules announced in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969), or Roddy, supra.

The rules announced in Boykin are that the constitutional validity of a plea of guilty requires "an affirmative showing that [the plea of guilty] was intelligent and voluntary," 395 U.S. 238, 242, and that the court will not presume the waiver by the defendant of his right to a trial by jury, to confront his accusers, and the privilege against self-incrimination "from a silent record." The rules of Roddy v. Black, 516 F.2d 1380, 1384 (6th Cir. 1975), are that

> [t]he state must prove that the defendant's guilty plea was voluntary and intelligent, and to do so it may introduce evidence extrinsic to the transcript of the plea acceptance.

And

> [i]n the face of an inadequate transcript at the time of a guilty plea's acceptance, the state must make a clear and convincing showing that the plea was in fact understandingly entered.[5]

---

[5]Our views do not differ in substance with the Eighth Circuit's statement in Todd v. Lockhart, 490 F.2d 626, 627-28 (8th Cir. 1974), that allowing evidence at a post-conviction hearing to "cure the otherwise defective plea-taking transcript . . . [does] not return to the pre-Boykin practice of assuming that a defendant represented by counsel has entered a voluntary and intelligent plea. Rather, [it means] that once a state prisoner has demonstrated that the plea taking was not conducted in accordance with Boykin, the state may, if it affirmatively proves in a post-conviction hearing that the plea was voluntary and intelligent, obviate the necessity of vacating the plea."

(emphasis added).

The Boykin and Roddy rules, forbidding the inference of a valid waiver of constitutional right from a "silent record" and requiring clear and convincing extrinsic proof

of a valid waiver, respectively, are not metaphysical abstractions. They are concerned with the manner and measure of proof by which the state must meet a defendant's claim that his previous guilty plea conviction is invalid, once there is a proper challenge to its validity, and not before. There is no occasion for the State of Kentucky or any state to carry any burden of proof about the validity of guilty pleas that were offered and accepted and reduced to judgment long ago, unless and until a defendant, in a subsequent judicial proceeding, offers a justiciable challenge to the presumed validity of the guilty pleas and the regularity of the judgments memoralizing them. The validity of all guilty plea convictions rest, in the first instance, upon the presumed validity or regularity of the judgment that has been entered upon this acceptance. Surely that presumed validity does not violate the Boykin rule against "presum[ing] a waiver of these three important federal rights from a silent record." No one would think for a moment, I should hope,

that the presumption of regularity or validity of court proceedings does not extend to the millions of unchallenged guilty pleas, finalized in judgments of conviction, on the books of the thousands of courthouses of all the states of the union and in the federal courts. The Kentucky Dunn procedure merely imposes upon a defendant the burden to raise the issue of the validity of a presumptively valid previous guilty plea, to get something moving judicially, by producing some modicum of evidence in support of his claim, failing which his guilty plea continues to be presumed valid. All the Kentucky Supreme Court has required is that if the state is to be put to its proof that a presumptively valid judgment of conviction resting upon a guilty plea is indeed invalid because the defendant did not intelligently and voluntarily waive relevant federal constitutional rights, the defendant must do more than just make a naked claim about the matter. He must initiate a challenge by presenting some evidence "through his testimony or other

affirmative evidence." Dunn, supra. Under the Dunn procedure, once the defendant initiates an evidentiary challenge, the presumption of regularity which attaches to all judgments of courts of record vanishes and the state must then undertake to carry its "burden to prove that the underlying judgments were entered in a manner which did in fact protect the rights of the defendant." Dunn, supra. The language in the Eighth Circuit's opinion in Todd v. Lockhart, 490 F.2d 626, 628 (8th Cir. 1974), which this court relied upon and quoted in its Roddy opinion, says as much: "once a state prisoner has demonstrated that the plea taking was not conducted in accordance with Boykin, the state may, if it affirmatively proves in a post-conviction hearing that the plea was voluntary and intelligent, obviate the necessity of vacating the plea." (emphasis added).

I agree entirely with my brother that "[i]n view of Boykin and Roddy, . . . where the record from the trial court is inadequate to affirmatively demonstrate that the plea was

intelligent and voluntary, the state may not utilize a presumption to satisfy its burden of persuasion." (emphasis added.) The Kentucky procedure set forth in Dunn does not permit the state to "satisfy" its "burden of persuasion" by invoking a presumption. It merely requires, as a procedural matter, that in order to impose upon the state a new burden to prove the validity of an heretofore presumptively valid guilty plea, the defendant must raise an issue as to its validity by offering some evidence of noncompliance with Boykin. When that is done, the state may not rely upon the presumption of regularity which attaches to all judgments of courts of record, including those generated by guilty pleas, to satisfy its newly assumed burden; it must instead proceed to prove, unaided by any presumption of regularity, that the plea in question is voluntary and intelligent.

When a defendant in Kentucky offers any evidence whatever in support of his claim that his guilty plea is constitutionally infirm, he

has "refute[d] the presumption of regularity" of the guilty plea judgment he has challenged and the Commonwealth is required to prove its validity according to the standards announced in Boykin and Roddy. The Kentucky Supreme Court's procedure does no violence to the rules announced in Boykin, Roddy, or any other binding federal constitutional precedent.

Kentucky has established a constitutionally sound procedure for the uniform, orderly and efficient determination of genuine, evidence-supported challenges to presumptively valid guilty pleas reduced to judgment in its courts, and this federal court is without authority to tell Kentucky its procedure is not acceptable.

FILED
JUN 13, 1989
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 88-5015

GENE M. DUNN, JR., Petitioner-Appellee,

v.
RON SIMMONS, Chairman, Parole Board, Corrections Cabinet, and
DAVID L. ARMSTRONG, Repondents-Appellants.

Before: RYAN and NORRIS, Circuit Judges; and LIVELY, Senior Circuit Judge*.

J U D G M E N T

ON APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

/s/Leonard Green
Clerk

* Honorable Pierce Lively became Senior Circuit Judge effective January 1, 1989.

No. 88-5015

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GENE M. DUNN, JR.,	)	
	)	
Petitioner-Appellee,	)	
	)	
v.	)	O R D E R
	)	
	)	
RON SIMMONS, CHAIRMAN PAROLE BOARD, CORRECTIONS CABINET; DAVID L. ARMSTRONG,	)	
	)	
Respondents-Appellants	)	

BEFORE: RYAN and NORRIS, Circuit Judges; and LIVELY, Senior Circuit Judge.

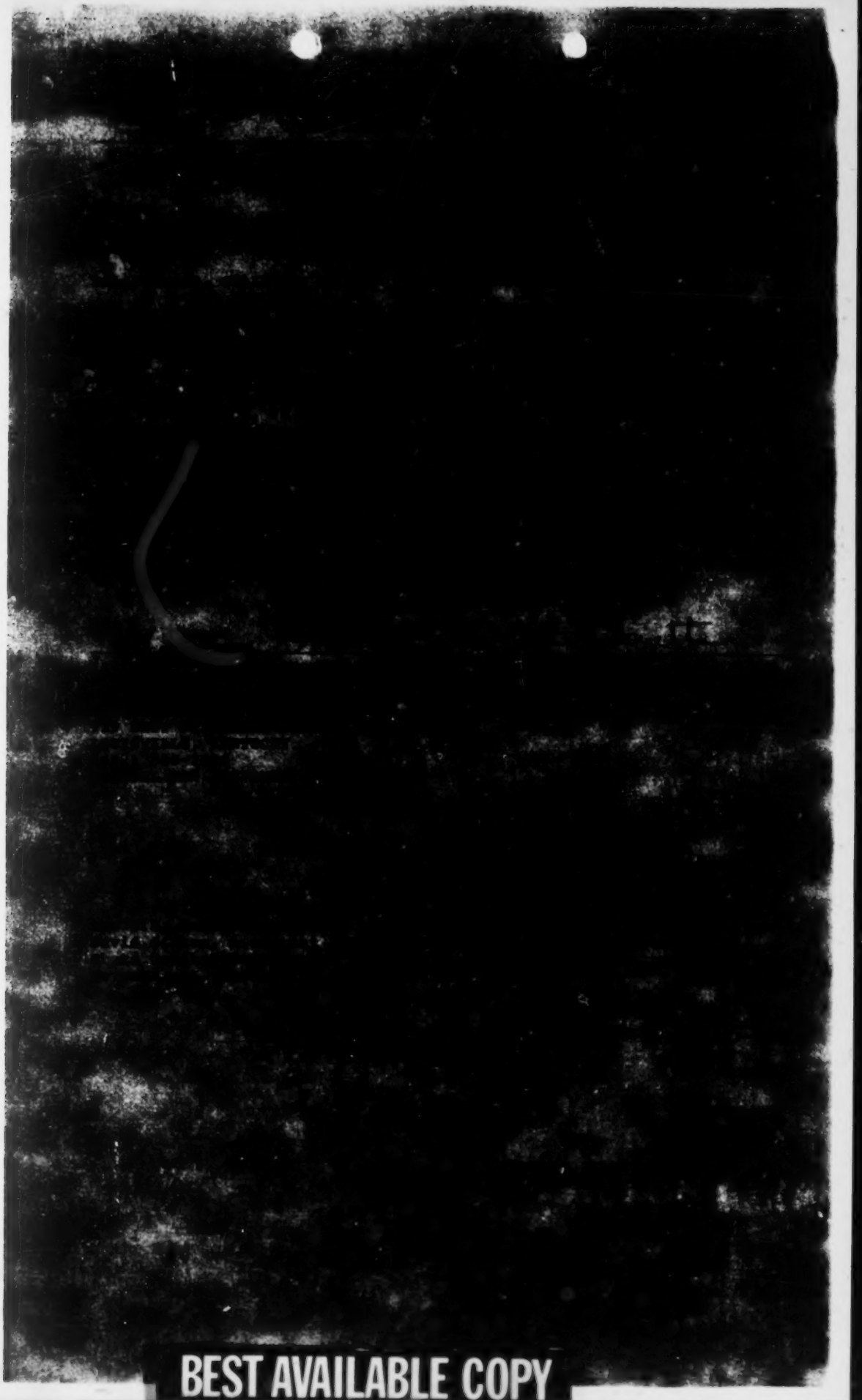
The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and

decision of the case. Accordingly, the petition is denied. While Judge Ryan adheres to the views expressed in his reported opinion, he would not grant rehearing.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green, Clerk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INTRODUCTION

Pursuant to Rule 22 of the Rules of this Court respondent, Gene Morris Dunn, Jr., by counsel, moves the Court to deny the petition for certiorari filed in this case on behalf of Simmons and Cowan because the petitioners do not state sufficient grounds to demand the attention of this Court under the criteria set out by Rule 17. The petition in this case is based on two flawed premises: (1) that a guilty plea judgment that does not affirmatively show the entry of a voluntary and intelligent plea is entitled to a presumption of regularity and (2) that the Sixth Circuit Court of Appeals was prohibited by considerations of federal comity from applying federal law to this issue and rejecting the "findings" of the Supreme Court of Kentucky. As to the first point made, petitioners ask for relief because of a purported conflict between Kentucky and Sixth Circuit law, a usurpation by the Sixth Circuit of Kentucky's prerogative to establish its own criminal procedure and evidence rules, a conflict between the Sixth Circuit decision and decisions of other state appellate courts and finally, a claim that the Sixth Circuit Court of Appeals opinion unnecessarily hampers Kentucky's efforts to deal with recidivists. As to the second point, petitioners claim that the Sixth Circuit was required to defer to the Supreme Court of Kentucky's findings of fact by 28 USC §2254(d), that considerations of federalism prohibit the Sixth Circuit from enacting a rule governing Kentucky procedure, and finally, that in any event, the burden of proof in cases like this cannot be clear and convincing evidence. These points are countered easily, but before doing so, it would be well to examine the basics of guilty plea law and the law governing the use of prior convictions to enhance sentences.

(1) Petitioners Misstate the Law When They Claim a Presumption of Regularity for Guilty Plea Records That Do Not Affirmatively Show a Knowing and Voluntary Plea.

Throughout the petition, Simmons and Cowan claim that the prior guilty plea convictions attacked by Gene Dunn in the state court were entitled to a presumption of regularity normally accorded a state court judgment. (Petition, p. 13, 15, 16, 17, 21). But, as

noted both in Dunn v. Commonwealth, 703 S.W.2d 874 (Ky., 1985) and Dunn v. Simmons, 877 F.2d 1275 (6th Cir., 1989) there were no transcripts at all in the 1970 and 1973 pleas. In the 1976 conviction, the transcript only revealed that Dunn was asked if he understood his right to jury trial and whether he was satisfied with the services of his attorney. [703 S.W.2d at 876; 877 F.2d at 1278]. On these facts, petitioners' claim cannot be sustained.

In Boykin v. Alabama, 395 U.S. 238 (1969) this Court at two points stated that

> "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." [395 U.S. at 242].

And

> "The three dissenting justices in the Alabama Supreme Court stated the law accurately when they concluded that there was reversible error because the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty." [395 U.S. at 244].

To dispel any doubt about the effect of Boykin, the Court in Brady v. U.S., 397 U.S. 742 (1970) wrote

> "4. The requirement that a plea of guilty must be intelligent and voluntary to be valid has long been recognized. * * * The new element added in Boykin was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily. [397 U.S. at 747].

These requirements have been recognized by Kentucky courts since the early 1970's. [Lewis v. Commonwealth, 472 S.W.2d 65 (Ky., 1971); Weatherford v. Commonwealth, 703 S.W.2d 882 (Ky., 1986)]. It is therefore difficult to understand petitioners' insistence on a presumption of regularity for judgments and records that do not show affirmatively the entry of a knowing and voluntary guilty plea. These records show error, plain on their face. Such records cannot be given a presumption of regularity without undercutting the reason for the affirmative showing requirement. That reason, as stated in Boykin, was that a plea of guilty is more than an admission of conduct, it is the conviction itself. In order to prevent such convictions through ignorance, incomprehension, coercion, terror,

inducements or threats the Court instituted the rule that the trial judge must "canvass" the issue with the defendant and must leave a record of so doing. [395 U.S. at 244-243]. It is to insure that guilty pleas represent the informed, free-will choice of the defendant that the on the record canvass requirement of Boykin exists. A knowing and voluntary plea, made upon reasonable advice of counsel is all but impervious to collateral attack. [Mabry v. Johnson, 467 U.S. 504, 508 (1984); U.S. v. Broce, ___ U.S. ___, 102 L.Ed.2d 927, 109 S.Ct. 757 (1989)]. Therefore, to make sure that this nearly irrevocable step is taken advisedly, this Court has insisted on a record that allows a reviewing court to determine that the plea was the knowing and voluntary act of the defendant. Petitioners' claim that the silent records in this case are entitled to a presumption of regularity simply is untenable. These records show error plain on their face. It is elementary law that the proponent of evidence must show to the court that the evidence it proposes to introduce is what it purports to be. Guilty plea convictions that do not comply with Boykin cannot be used in criminal penalty enhancement cases. To do so would violate the rule set out by this Court in Burgett v. Texas, 389 U.S. 109 (1967). The Sixth Circuit in this case has in no way usurped the right of the Commonwealth of Kentucky to order its own procedure. It has done no more than apply clear and long-established rules of federal constitutional law to the facts of this case. This is the function of the writ of habeas corpus. Therefore, the petitioners err when they claim a presumption of regularity for the records in this case.

The problem in this case stems from the case of Commonwealth v. Gadd, 665 S.W.2d 915 (Ky., 1984) in which the Supreme Court of Kentucky ruled that the admission of a prior criminal conviction could be had simply by introducing evidence showing the fact of its entry. In Gadd, the Supreme Court of Kentucky noted that Ky. Rev. Stat. 532.080 "does not specify that the Commonwealth must affirmatively prove both the fact of conviction and that the previous conviction was not obtained by constitutionally impermissible means. [665 S.W.2d at 917]. Gadd was a right to counsel case. In Dunn v. Commonwealth, 703 S.W.2d

874, 876 (Ky., 1985) respondent presented the Supreme Court of Kentucky with a guilty plea case. The Supreme Court of Kentucky set out a procedure in which it stated that the only initial burden of the Commonwealth was to prove the existence of a judgment of conviction for each offense it intended to use. "The presumption of regularity of judgment shall be sufficient to meet the original burden of proof". After the judgments were introduced, according to the Kentucky court, "the burden shifts to the defendant to show an infringement of his rights or irregularity of procedure upon which he relies, such as those set out in Boykin v. Alabama, (citation omitted), or other pertinent cases." The Supreme Court of Kentucky insisted that the defendant testify or give other "affirmative evidence" to refute the "presumption of regularity". Once the defendant did so, then the burden fell to the Commonwealth "to prove that the underlying judgments were entered in a manner which did, in fact, protect the rights of the defendant." [703 S.W.2d at 876].

The operation of the rule is demonstrated in the opinion of the Kentucky Supreme Court. According to the Supreme Court of Kentucky, no evidence was given to rebut the presumption of regularity in relation to the 1976 conviction. [703 S.W.2d at 876]. This conviction was devoid of any but the most rudimentary showing of a knowing and voluntary plea. However, the Supreme Court of Kentucky refused to consider the validity of this prior conviction and proceeded on to decide only the 1970 and 1973 convictions about which Dunn did testify. The state Dunn rule, as it came to be called, ignores the clear dictates of Boykin and Burgett v. Texas. Kentucky cannot be allowed to create such a rule. Boykin says that a guilty plea record that does not show affirmatively the entry of a knowing and voluntary plea shows invalidity, clear on its face. Burgett says that no constitutionally invalid conviction may be used to enhance a criminal sentence. This Court's rulings are the authoritative construction of the constitution and therefore, Kentucky may not deviate from these clearly established rules. [Constitution, Article 6; Cooper v. Aaron, 358 U.S. 1, 18-19 (1958)]. The validity of a guilty plea is obviously a matter of

federal constitutional law. [Marshall v. Lonberger, 459 U.S. 422 (1983)].

In its opinion, the Sixth Circuit Court of Appeals did no more than hold that federal law controls the determination of the validity of the guilty plea and that the Kentucky Dunn rule ". . . ignores the Supreme Court's admonition in Boykin against presuming a waiver from a silent record." [Dunn v. Simmons, 877 F.2d 1275, 1277-1278 (6th Cir., 1989)]. There can be no legitimate complaint against this ruling; it only states the law as it has been since 1969. Therefore, the keystone of petitioners' argument, the purported "presumption of regularity" attributed to state court judgments, has been knocked out. The remaining arguments of the petition based on it necessarily must fail.

There is a conflict between Kentucky and the Sixth Circuit Court of Appeals on this issue. This does not mean that certiorari is necessary. Dunn v. Simmons is less than six months old at the time of this writing. The Supreme Court of Kentucky has not indicated that it intends to ignore the reasoning of the Sixth Circuit nor should this Court presume that the Supreme Court of Kentucky will insist on its own rule in the future. Although the Supreme Court of Kentucky is not bound by Dunn v. Simmons as precedent, until there is an indication that Kentucky will ignore that decision the purported conflict claimed by petitioners exists only on paper.

The federal cases cited on pages 15-17 of the petition are inapposite and do not establish the point petitioners wish them to. These cases do not deal with guilty pleas. Loper v. Beto, 405 U.S. 473 (1972) is a right to counsel case, as are Robards v. Rees, 789 F.2d 379 (6th Cir., 1986) and Luna v. Black, 772 F.2d 448 (8th Cir., 1985). This Court has not set out any affirmative showing requirement for right to counsel cases. Only guilty plea cases, involving pleas that are themselves the conviction, have such a requirement. Where guilty pleas are concerned, the federal Courts of Appeal are largely in agreement with the Sixth Circuit Court of Appeals. In Roddy v. Black, 516 F.2d 1380, 1384 (6th Cir., 1975), a case on which the decision in Dunn v. Simmons is based, the Sixth

Circuit noted that both the Fifth and the Seventh Circuits agreed that in the absence of an adequate transcript of a guilty plea the state must make a clear and convincing showing that the plea was in fact knowingly and understandingly entered. In Todd v. Lockhart, 490 F.2d 626 (8th Cir., 1974) that court also ruled that where the record was inadequate, the state had the burden of proving by extrinsic evidence the validity of the plea. Also, in U.S. v. Pricepaul, 540 F.2d 417 (9th Cir., 1976) that court ruled that where the record is silent about whether the defendant entered his guilty plea in a knowing and voluntary manner the state must go forward with evidence to prove validity. Each of these cases was based on the clear statement of this Court in Boykin v. Alabama that the record must reflect affirmatively the knowing and voluntary entry of a guilty plea. Thus, the law is quite the contrary to the claim of petitioners in this case. Where guilty pleas are concerned, precedent of long standing in several circuits agrees with the procedure followed by the Sixth Circuit in this case.

Nor does the opinion of the Sixth Circuit Court of Appeals in this case conflict with decisions of other states as claimed by petitioners. People v. Harris, 459 N.E.2d 170 (NY, 1983) relied on by petitioners is explained in Bellacosa's 1984 Supplement to the Commentary of Section 400.21 of New York's Criminal Procedure Law. [11A McKinney Consol. Laws, Crim. Proc. Law, §400.21, 1989 Pocket Part, p. 63]. As explained in that case, five of the six defendants involved in Harris complained about records of their guilty pleas that showed "minor omissions in the plea allocutions at the time of the entry of the predicate felony plea." However, one defendant, Vargas, presented a record that showed "no discussion whatsoever between the trial judge and defendant" and therefore his claim of an unintelligent plea was sustained by the court. The point of Harris, as made clear by this Commentary, is that where the record is completely silent, New York courts will not presume the plea to be knowing and voluntary. Obviously, New York practice under Harris more closely resembles the procedure outlined by the Sixth Circuit than the rules set out by the Commonwealth of Kentucky.

The Colorado rule is not substantially different from that of the Sixth Circuit Court of Appeals. In Lacey v. People, 775 P.2d 1 (Colo. Banc., 1989) that court listed its procedures for the challenge of a prior guilty plea. That court held that an unconstitutionally obtained prior conviction could not be used in a subsequent enhancement proceeding, that due process requires a guilty plea to be voluntary, that to establish voluntariness the record generated at the plea "as a whole" must "affirmatively demonstrate that the defendant understood the constitutional rights he was waiving and the critical elements of the crime . . .", that a reviewing court could not presume from the mere fact that a guilty plea was entered that the defendant waived his constitutional rights and understood the elements of the crime, and, that a prima facie showing by the defendant challenging his conviction is made when the evidence, in the light most favorable to the defendant, will permit the court to conclude that the conviction failed to meet relevant constitutional standards. [775 P.2d at 4-6]. The fair conclusion from this rule is that a defendant who shows a record of a guilty plea that does not comply with Boykin will make the required prima facie showing. Watkins v. People, 665 P.2d 834, 837 (Colo., 1982) when read in the light of the later case, (Lacey) follows this rule.

The Oregon case cited by petitioners, State v. Annino, 613 P.2d 84 (Ore. App., 1980) is inapposite because it is a right to counsel case. Because there is no requirement of affirmative showing in right to counsel cases it is clear that Annino has little to add to the petitioners' argument.

Another case cited by petitioners, People v. Sumstine, 687 P.2d 904 (Cal., 1984) is somewhat unclear. A close reading of the rule set out in Sumstine appears to be that a defendant challenging a predicate conviction cannot rely solely on the state court rule (established in In Re Tahl, 460 P.2d 449 (Cal., 1969) that requires enumeration and express waiver of the three trial rights announced in Boykin. [687 P.2d at 906; 913]. The court also ruled that it could not see why a guilty plea case should be handled any differently from any other type. [687 P.2d at 913]. The obvious answer to this is that this Court in Boykin v. Alabama and Brady v.

U.S. has told the courts that guilty pleas are to be handled differently. In any event, it is plain that there is no great conflict among the jurisdictions. If there is a conflict between the Sixth Circuit Court of Appeals and other courts, it is with only two other courts, New Mexico and California. Petitioners do not explain why the mere existence of conflict justifies the attention of this Court. This petition for certiorari is not the logical vehicle for settling questions of California or New Mexico law. Therefore, this reason for review must be rejected.

As a last reason for review petitioners claim that the Sixth Circuit Court of Appeals has made a ruling that will hamper Kentucky's prosecution of recidivists. This argument also is based on a false premise. If Kentucky is hampered or prevented from prosecuting recidivists it will be because it failed to read this Court's decisions and apply them consistently. No state can claim that the court did not say clearly in Boykin v. Alabama and Brady v. U.S. what it wanted to be done. Certainly, as shown in Lewis v. Commonwealth, 472 S.W.2d 65, 66 (Ky., 1971) Kentucky courts were on notice that the trial judge in guilty plea cases was to discuss the plea with the defendant and make a record of that discussion that would allow a reviewing court to determine that the plea was knowing and voluntary. Kentucky did not do so. Therefore, if any problem exists, it is the fault of Kentucky, not the fault of the Sixth Circuit Court of Appeals for applying long and well-established federal constitutional law precedents. Petitioners have not stated any reason to grant review under this heading of their argument.

(2) The Federal Appellate Court Was Not Required to Defer to the "Findings" of the Supreme Court of Kentucky.

The short answer to petitioners' complaint about deference is that they have not been able to convince any federal judge that the evidentiary holdings of the Supreme Court of Kentucky are entitled to deference. Nor is petitioners' argument about the standard of proof convincing. A guilty plea case must have a more severe burden of proof because a guilty plea is different from any type of evidence.

> "A guilty plea is more than a confession which admits that the accused did various acts . . . it is an admission that he committed the crime charged against him." [U.S. v. Broce, ___ U.S. ___, 102 L.Ed.2d 927, 936, 109 S.Ct. 757 (1989)].

When the accused has voluntarily and knowingly pleaded guilty, collateral attack with, rare exceptions, is foreclosed. [Mabry v. Johnson, 467 U.S. 504, 508 (1984)]. Because of the gravity of the guilty plea this Court established the Boykin rule which requires generation of a record that allows a reviewing court to be satisfied that the plea was knowing and voluntary. When that rule is not followed, as in this case, the state must, if it can, show by extrinsic evidence that the plea was knowing and voluntary. [Roddy v. Black, 516 F.2d 1380, 1384 (6th Cir., 1975)]. But the evidence available to the state, in the absence of satisfactory records, will in most cases be the "murky memories" of the participants in the earlier action. [Boykin v. Alabama, 395 U.S. 238, 244 (1969)]. It is for this reason that the clear and convincing standard must be followed. Any lesser standard would allow the state to profit from its previous disregard of the clear direction of this Court in Boykin v. Alabama. Any other standard would erode the confidence that courts can have in guilty pleas as a result of the Boykin rule. Therefore, the Sixth Circuit correctly applied the clear and convincing standard.

The reliability of the fact finding of the Supreme Court of Kentucky can be determined by comparison of its rendition of the evidence and that set out by the Sixth Circuit Court of Appeals. In Dunn v. Simmons, 877 F.2d at 1278 , the Sixth Circuit correctly noted that the record showed that at the suppression hearing Dunn testified that he was not advised by the trial judge of his rights to jury trial, cross-examination, or silence. (NR.2, Appendix 27-28; 29; 30; 35; 37). Upon cross-examination by the state, Dunn admitted that he had knowledge "now from the trials I had" that he was entitled to a jury trial and could cross-examine witnesses, but he said that he did not understand anything back in 1970 and 1973. (NR.2, Appendix 35, 27, 41). In Dunn v. Commonwealth, 703 S.W.2d 874, 876 (Ky., 1985) the Supreme Court of Kentucky stated that "no

evidence was given to rebut the presumption of regularity in relation to the 1976 conviction." The Supreme Court of Kentucky noted that Dunn had testified that the trial judge failed to advise him of certain rights prior to the entry of the guilty plea in 1970 and 1973. Then the Supreme Court of Kentucky concluded that on cross-examination ". . . he readily admitted that he knew of the rights about which he contends he was not informed by the court." It is clear from a reading of the opinions and the record that the Supreme Court of Kentucky misread the transcript of proceedings. Its claim that Dunn introduced no evidence concerning the 1976 conviction was flatly wrong. The record of the plea was evidence. Its determination that Dunn admitted knowing his rights simply was a misreading of the record in which Dunn conceded that he had knowledge as of the time of the suppression hearing in the instant action as a result of later jury trials. But Dunn stated that he did not understand anything in 1970 or 1973. Petitioners cannot demand deference to such sloppy handling of the record. The Sixth Circuit Court of Appeals had access to the same paper transcript used by the Supreme Court of Kentucky. The words on the paper did not change. The Sixth Circuit however correctly read those words. For this reason petitioners cannot realistically claim deference to the determinations of the Supreme Court of Kentucky. For this reason, review should be denied.

CONCLUSION

For the reasons set out above, the Court is urged to deny the petition for writ of certiorari requested in this case.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RON SIMMONS, Chairman,
Kentucky Parole Board, et. al.,

Petitioners,

vs.

GENE MORRIS DUNN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION

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Question Presented

After *Teague* v. *Lane*, 109 S.Ct. 1060 (1989), may a federal habeas court set aside a final decision of a state supreme court on the ground that the decision violates a rule which has been adopted by the federal court of appeals but which has *not* been adopted by the Supreme Court?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RON SIMMONS, Chairman,
Kentucky Parole Board, et. al.,

Petitioners,

vs.

GENE MORRIS DUNN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF AMICUS

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest.

CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of

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1. CJLF has received written consent of the parties to file this brief.

society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves the relitigation of a question fully and fairly litigated in the state courts with proper respect for this Court's precedents and for the constitutional rights of the respondent. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF ARGUMENT

This case involves a disagreement between the Kentucky Supreme Court and the U.S. Court of Appeals for the Sixth Circuit on a question of law not yet addressed by this Court. The Kentucky court's decision was well within the mainstream of American jurisprudence and was more generous to the defense than many jurisdictions. In at least two other federal circuits, the state court decision would have been upheld on the key question of burden of proof. Yet because Kentucky happens to be in the Sixth Circuit, the judgment was set aside as being in violation of circuit precedent.

Under *Teague* v. *Lane*, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), new rules will not apply on federal habeas corpus unless they were announced by *this* Court prior to the day the conviction became final. Circuit precedent is irrelevant to this determination.

It therefore follows that the lower federal courts have no authority to set aside state court decisions which merely conflict with circuit precedent but which do not violate any precedent of the Supreme Court. Regardless of how old a circuit precedent may be, its rule is forever

"new" under *Teague* unless and until it is embraced by this Court.

This result makes sense, because it conforms to the long-standing rule that the lower federal courts have no authority to make precedents which are binding on the state courts. While federal habeas corpus allows this Court to delegate error correction to the lower federal courts, the making of precedents which are binding on the states rightly belongs only to this Court.

ARGUMENT

I. The state court decision was well within the mainstream.

The writ of habeas corpus was expanded early in this century to remedy such clear and unquestionable violations of constitutional rights as mob-dominated trials, *Moore* v. *Dempsey*, 261 U.S. 86 (1923), and total deprivation of counsel, *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). It is a sad comment on how low the Great Writ has fallen that it was issued in this case merely because the Sixth Circuit disagrees with the Kentucky Supreme Court on a question where the state court is solidly in the mainstream of judicial thought while the federal court has drifted off into the bayou.

A. Federal Cases.

The Sixth Circuit insisted in this case that the "federal standard" requires a showing by "clear and convincing" evidence that the requirements of *Boykin* v. *Alabama*, 395 U.S. 238 (1969) were complied with in Dunn's prior convictions. Cert. Pet. 39a. This view appears to be entirely peculiar to the Sixth Circuit.

The Ninth Circuit has held that a silent record shifts the burden to the government to show a valid waiver. *United States* v. *Goodheim*, 651 F.2d 1294, 1299 (9th Cir. 1981). Neither *Goodheim* nor the cases it relies on identify the extent of that burden, but other Ninth Circuit cases dealing with analogous situations make clear that the burden is preponderance of the evidence. See *Farrow* v. *United States*, 580 F.2d 1339, 1355 (9th Cir. en banc 1978) (prior attacked on *Gideon* grounds); *United States* v. *Lord*, 711 F.2d 887, 891 n. 3 (9th Cir. 1983) (citing a variety of constitutional claims with preponderance burdens of proof).[2]

The Fifth Circuit has gone even further. In *Walker* v. *Maggio*, 738 F.2d 714, 717 (5th Cir. 1984), *cert. den.* 469 U.S. 1112 (1985), the Fifth Circuit stated "Petitioner has the burden to demonstrate facts establishing that his 1971 guilty plea was not intelligently and voluntarily made because he was not advised of his rights as required by Boykin." Accord, *United States* v. *Woods*, 870 F.2d 285, 287 (5th Cir. 1989).

The Fifth Circuit appears to be less generous to the defendant than the state court decision in the present case. It is certainly no more so. Kentucky appears to only require that the defendant produce some evidence. *Dunn* v. *Commonwealth*, 703 S.W.2d 874, 876 (Ky. 1985), *cert. den.* 479 U.S. 832 (1986). The Fifth Circuit requires the defendant to prove a prima facie case. *Woods*, *supra*, 870 F.2d at 287. Kentucky explicitly shifts the burden of

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2. The Ninth Circuit thus agrees with the Sixth Circuit on the burden of producing evidence and with the Kentucky Supreme Court on the ultimate burden of persuasion. Because Dunn did produce evidence, only the second question is actually presented by this case.

persuasion to the state. *Dunn*, *supra*, at 876. No such shift appears in the Fifth Circuit decisions. In leaving the burden of persuasion with the habeas petitioner, the Fifth Circuit is merely following the square holding of one of this Court's landmark cases: *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

Johnson had been convicted in a federal court for counterfeiting. *Id.* at 459. He had not been represented by counsel. Although he had not specifically requested counsel from the court, he claimed not to have waived counsel. *Id.* at 460-461.

Against the government's contention that Johnson had waived his right by failure to request counsel, Justice Black wrote his now-famous pronouncement for the Court:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* at 464 (footnotes omitted).

Taken alone, this passage might be taken to imply that the "presumption against waiver" shifts the burden of proof to the government to prove nonwaiver. Justice Black dispelled this misconception in no uncertain terms.

> "It must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on *habeas corpus*. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus*, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of Counsel.
>
> * * *
>
> "If petitioner fails to sustain this burden, he is not entitled to the writ." *Id.* at 468-469 (footnotes omitted).

In subsequent habeas corpus cases, this Court repeatedly reaffirmed the rule of *Johnson* v. *Zerbst*: the burden is on the petitioner to prove his factual allegations by the preponderance of the evidence. *Walker* v. *Johnston*, 312 U.S. 275, 286 (1941); *Hawk* v. *Olson*, 326 U.S. 271, 279 (1945); *Darr* v. *Burford*, 339 U.S. 200, 218 (1950) overruled on other grounds *Fay* v. *Noia*, 372 U.S. 391, 435 (1963); *Brown* v. *Allen*, 344 U.S. 443, 458, n. 6 (1953).

In *Moore* v. *Michigan*, 355 U.S. 155 (1957), the petitioner claimed, on state collateral review, that although he had waived counsel his waiver was not knowing and intelligent. The Court followed *Johnson* v. *Zerbst*, *supra*, holding that "the petitioner had the burden of showing, by a preponderance of the evidence, that he did not intelligently and understandingly waive his right to counsel." *Id.* at 161-162.

In *Carnley* v. *Cochran*, 369 U.S. 506 (1962), the petitioner affirmatively alleged that he had requested counsel, and the return did not allege an affirmative waiver of counsel. *Id.* at 516 n. 10. Nevertheless, the state su-

preme court presumed a waiver from the mere fact of defendant's appearance at trial without counsel, and denied habeas corpus without a hearing. *Id.* at 513. The Supreme Court held this presumption impermissible.

> "Nor is it an answer to say that he may counter such presumptions on collateral attack by showing — if he can — that he had not in fact agreed, or been willing, to be tried without counsel. To cast such a burden on the accused is wholly at war with the standard of proof of waiver of the right to counsel which we laid down in *Johnson* v. *Zerbst*, 304 US 458, 464-465 . . . ." *Id.* at 514.

This language might, on its face, seem to support the notion that the burden of proving waiver is on the government, but a closer examination reveals that *Carnley* makes no such holding. First, the opinion itself declares absolute fidelity to *Johnson* v. *Zerbst*, which unequivocally places the burden on the petitioner.[3] More importantly, the Court treated this case as one of undisputed facts. Between the petitioner's allegation that he requested counsel and the absence of any allegation of waiver in the return, nonwaiver was established by the pleadings. *Id.* at 516 n. 10. Under these circumstances, there is no burden of proof issue.

Recent cases contain little discussion of the burden of proof on collateral attack. The last square holding appears to be *Kitchens* v. *Smith*, 401 U.S. 847, 848 (1971), placing the burden of proving indigency for a *Gideon* claim[4] on the habeas petitioner. The only recent word we have found is an approving citation of *Moore* v. *Mich-*

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3. See p. __, *supra*.

4. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

igan, *supra*, in *Colorado* v. *Connelly*, 479 U.S. 157, 169 (1986) (reaffirming the preponderance of the evidence standard in *Miranda* cases).

The requirements imposed by the Sixth Circuit, that the government bears the burden of proving compliance with *Boykin* and that the burden is proof by clear and convincing evidence, are not found in any opinion of this Court or in any consensus among the federal circuits. To the extent these sources indicate a correct answer, they indicate that the Kentucky court was, if anything, overly generous to the defendant.

B. State Cases.

As petitioner has noted, *People* v. *Harris*, 61 N.Y.2d 9, 459 N.E.2d 170 (1983) is contrary to the decision of the court below. Actually, the New York rule is even *less* favorable to the defendant than the rule adopted by the state court in the present case. *Harris* held that once the fact of the prior conviction is proven, defendant bears the burden of *proving* its unconstitutionality. *Id.* at 15, 459 N.E.2d at 172. Texas also places the burden of proof on the defendant, at least with respect to right-to-counsel claims.[5] *Disheroon* v. *State*, 687 S.W.2d 332, 334 (Tex. Cr. App. 1985).

The Utah Supreme Court recently provided a helpful survey of state decisions in a right-to-counsel case, *State* v. *Triptow*, 770 P.2d 146 (Utah 1989). *Triptow* identified three divergent views: (1) placing the burden of proof of

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5. There is no reason for a *Boykin* claimant to have a *lower* burden of proof than a *Gideon* claimant. See *People* v. *Sumstine*, 36 Cal.3d 909, 922, 687 P.2d 904, 913 (1984). The right to counsel is by far the more imporant right.

unconstitutionality on the defendant by a preponderance of the evidence; (2) requiring the prosecution to prove representation or waiver by at least a preponderance as part of its case in chief; and (3) placing the burden of production of evidence on the defendant but shifting the burden of persuasion to the state upon the defendant's production of any evidence. *Id.* at 148. The third category represents the "middle ground." The Utah court identifies Florida, New Jersey and Rhode Island as being in the first group,[6] Hawaii, Kansas and Ohio as being in the second, and Indiana, Maryland and North Carolina as the third. *Ibid.* The *Triptow* court joins the third group, *id.* at 149, which also includes Kentucky by virtue of the present case.

Kentucky is thus squarely in the middle of the states which have considered the issue.

II. After *Teague* v. *Lane*, circuit precedent cannot establish a rule applicable on habeas corpus.

In *Teague* v. *Lane*, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), this Court established that, with rare exceptions not applicable here, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 1075, L.Ed.2d at 356.[7]

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6. As discussed above, we would also include New York and Texas.

7. This portion of *Teague* is a plurality opinion, but it was endorsed by a majority in *Penry* v. *Lynaugh*, 109 S.Ct. 2934, 2944, 106 L.Ed.2d 256, 274 (1989).

Announced by whom? The Court's treatment of Teague's claim leaves no doubt, if indeed there had been any, that a rule is "new" when it is announced by the Supreme Court, no matter how long ago lower courts may have accepted the argument.

Teague's contention was "that the Sixth Amendment's fair cross section requirement applies to the petit jury." *Id.* at 1069, L.Ed.2d at 348. This was hardly a novel argument. It had been accepted by the California Supreme Court over a decade earlier, albeit under a cognate provision of the state constitution. *People* v. *Wheeler*, 22 Cal.3d 258, 276-277, 583 P.2d 748 (1978). Two federal circuits had upheld claims similar to Teague's. *Booker* v. *Jabe*, 775 F.2d 762, 767-71 (6th Cir. 1985), *vacated sub. nom. Michigan* v. *Booker*, 478 U.S. 1001 (1986), *opinion reinstated*, 801 F.2d 871 (1986), *cert. denied*, 479 U.S. 1046 (1987); *McCray* v. *Abrams*, 750 F.2d 1113, 1130-31 (2d Cir. 1984), *vacated sub. nom. Abrams* v. *McCray*, 478 U.S. 1001 (1986); *Roman* v. *Abrams*, 822 F.2d 214, 225 (2d Cir. 1987) (reaffirming *McCray*).

These lower court authorities had been briefed to the *Teague* Court, see Brief for the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae 13, but they made no difference to the Court's analysis. Announcing that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final," 109 S.Ct. at 1070, 103 L.Ed.2d at 349 (italics in original), the Court looked only at its *own* precedents in making that determination. *Ibid.*

Where does this leave rules announced by lower federal courts but not embraced by this Court? The clear import of *Teague* is that such rules cease to apply on habeas corpus. The lower federal courts no longer have authority to make new rules on habeas corpus, absent

one of the rare exceptions. See *id.* at 1078, L.Ed.2d at 360. Without such authority, there is no justification for imposing circuit precedent on the states.

The lower federal courts have never had the authority to make precedent which is directly binding on the state courts. See 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice*, ¶ 0.402[1] at 23 (2nd ed. 1988). Why, then should they be authorized to set aside a state court judgment merely for failure to follow a precedent which the state court has *no obligation* to follow?[8] If the state court duly followed all precedents binding upon it, is petitioner genuinely "in custody in violation of the Constitution . . . of the United States"? See 28 U.S.C. § 2254(a). If not, the federal courts have no jurisdiction to issue the writ. *Ibid.*

The Harlan theory adopted by this Court in *Teague* is as much a rethinking of the purpose of habeas corpus as it is a theory of retroactivity. See *Mackey* v. *United States*, 401 U.S. 667, 682 (1971) (Harlan, J., concurring and dissenting). Its implications are only beginning to be understood.

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8. The Kentucky Supreme Court's decision, says the Sixth Circuit, "offends this court's requirement in *Roddy* . . . ." Cert. Pet. 35a. The refusal of a coordinate court to follow a decision not binding upon it may be offensive to the Sixth Circuit, but it was well within the Kentucky Supreme Court's authority.

Conclusion

This Court should grant certiorari to resolve this important issue.

Dated: November, 1989

Respectfully submitted,

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